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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-1741, 79-1744

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. AND LUEA SORENSON, R.G.P. INCORPORATED, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,
Petitioners,

VS.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

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OPINIONS BELOW AND OF THIS COURT

The following opinions of courts in this case have been rendered:

The original memorandum opinion of the District Court for the Northern District of Iowa, together with

its findings of fact and conclusions of law, is reported at 433 F. Supp. 57 and 67 (N.D. Iowa 1977). The initial opinion of the Eighth Circuit Court of Appeals is reported at 575 F.2d 620 (8th Cir. 1978).

The opinion of this Court, dated June 20, 1979, upon certiorari to the Eighth Circuit (No. 78-160 and 78-161) is reported at 442 U.S. 653 (1979).

The opinion of the Court of Appeals of the Eighth Circuit dated January 15, 1980 on remand from this Court, is reported at 614 F.2d 1153 (8th Cir. 1980).

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

25 U.S.C. § 194 provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

QUESTION PRESENTED

Whether 25 U.S.C. § 194 is unconstitutional because it automatically assigns the burden of proof on a racial basis in violation of the Fifth Amendment and because it seriously impinges upon the fundamental due process right to effectively engage in the litigation process.

INTEREST OF THE AMICUS CURIAE AND REASONS FOR GRANTING THE WRIT [1]

There is presently pending in numerous federal courts extensive Indian claims litigation for the recovery of

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[1] Attorneys for all of the parties herein have given written consent to the filing of this amicus brief. Copies of the consents have been submitted to the Court with this brief.

land and for trespass or other damages for the wrongful possession of the land.[2] These cases seek the return of vast amounts of real property and monetary damages from present owners upon the basis that past acquisitions of Indian tribal land by the defendants or their prede-

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[2] A partial list of cases includes: United States v. Maine, Civ. No. 1966-ND (D. Me.); Western Pequot Tribe v. Holdridge Enterprises, Inc., Civ. No. H-76-193 (D. Conn.); Schaghticoke Tribe v. Kent School Corp., Civ. Action No. H-75-125 (D. Conn.); Mohegan Tribe v. Connecticut, Civ. No. H-77-434 (D. Conn.); Chitimacha Tribe v. Harry L. Laws Co., Inc., Civ. No. 77-0772-L (W.D. La.) (notice of appeal filed April 25, 1980); The Oneida Indian Nation of New York v. County of Oneida, 70-CV-35, 74-CV-187 (N.D.N.Y.); The Oneida Indian Nation of New York v. New York State Thruway Authority, 78-CV-104 (N.D.N.Y.); Seminole Tribe of Florida v. Florida, No. 78-6116-CIV (S.D. Fla.); Chitimacha Tribe v. Smith, Civ. Action No. 79-0493-L (W.D. La.); Chitimacha Tribe v. A. Wilbert Son's Lumber & Shingle Co., Civ. Action No. 79-184 (W.D. La.); Pechanga Band of Mission Indians v. Kacor Realty, Inc., Civ. Action No. 78-4499-MML-GX (C.D. Calif.); Dennison v. Topeka Chambers Ind. Dev. Corp., Civ. Action No. 79-1668 (D. Ks.); The Oneida Indian Tribe of Wisconsin v. New York, 79-CV-798 (N.D.N.Y.); Chitimacha Tribe v. Laws, Civ. Action No. 80-0637 (W.D. La.); Chitimacha Tribe v. Ensminger, Civ. Action No. 80-0638 (W.D. La.). In addition to these and numerous other pending cases, the United States, through the Department of Interior, recommended this year that the applicable statute of limitations for the commencement of Indian damage claims by the United States, 28 U.S.C. § 2415, be extended. In connection with this legislation, the Department of Interior reported that it now is processing some 9,768 Indian claims and stated that more than 5,000 additional, identifiable claims may not yet be inventoried. S. Rep. No. 96-569, 96th Cong., 2d Sess. p. 8 (1980). Undoubtedly many of these claims may arise in situations where Section 194, as previously construed by the Court, would be applicable.

cessors in interest were invalid and of no effect. This litigation has been instituted in virtually every instance by either the United States, as trustee, or by the Indian tribes themselves, or both.[3]

The statute at issue herein, 25 U.S.C. § 194, purporting to govern the allocation of the burden of proof in Indian claims litigation "about the right of property" had never been applied in any reported case prior to the initial opinion of the Eighth Circuit herein from the time of the enactment in its original form some one hundred and fifty-eight years ago.[4] However, since that time and this Court's subsequent interpretation of the statute, it has been repeatedly invoked in support of this kind of litigation.[5] As these claims continue to multi-

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[3] Among the more substantial of the claims for land and damages asserted in the pending cases are United States v. Maine, *supra*, approximately 12.5 million acres and an estimated $25 billion in trespass damages; Chitimacha Tribe v. Harry L. Laws Co., Inc., *supra*, several thousand acres of land and $100 million in damages; The Oneida Indian Nation of New York v. County of Oneida, *supra*, approximately one hundred thousand acres; Dennison v. Topeka Chambers Ind. Corp., *supra*, 23 one-square-mile tracts valued at approximately $100 million; and, The Oneida Indian Tribe of Wisconsin v. New York, *supra*, approximately five million acres.

[4] The opinion of the Court of Appeals notes that two previous cases had cited Section 194 but that "neither case expounds upon the effect this section should be given." 575 F.2d at 631 n.19. United States v. Sands, 94 F.2d 156 (10th Cir. 1938); Felix v. Patrick, 36 F. 457 (C.C.D. Neb. 1888), *aff'd*, 145 U.S. 317 (1892). This Court also recognized that prior to the instant case the statute had been "seldom used" and "dormant." 442 U.S. at 658, 667.

[5] *See, e.g.*, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 588-89 (1st Cir.), *cert. denied*, 100 S.Ct. 138 (1979); Chitimacha Tribe v. Harry L. Laws Co., Inc., *supra*; Chiti-

ply,[6] it may not be doubted that reliance upon this statute will continue.

As this Court previously noted, Section 194 "operates *regardless of the circumstances* once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute." 442 U.S. at 668 (emphasis supplied). Inasmuch as the events complained of in Indian land claims litigation occurred in the distant past, in many cases hundreds of years ago, the outcome of the litigation often will rest upon the burden of proof.[7] Thus, the need for this Court's examination of the constitutionality of Section 194 at this time is particularly compelling. Prompt resolution of this question will provide constructive guidance to the many trial and appellate courts presently confronted with this litigation, thereby avoiding unnecessary appeals and re-trials.

The American Land Title Association ("ALTA"), is the national trade association of the land title industry. Its approximately 2,200 members include land title insurers, their agents, abstractors and associate members. The principal function of the land title industry is to

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macha Tribe v. Smith, *supra*; Chitimacha Tribe v. A. Wilbert Son's Lumber & Shingle Co., *supra*; Pechanga Band of Mission Indians v. Kacor Realty, Inc., *supra*; Dennison v. Topeka Chambers Ind. Dev. Corp., *supra*; Chitimacha Tribe v. Laws, *supra*; Chitimacha Tribe v. Ensminger, *supra*.

[6] *Supra*, note 2.

[7] The application of the burden of proof is frequently critical in any case, as this Court has observed:

> Where the burden of proof lies on a given issue is . . . rarely without consequence and frequently may be dispositive to the outcome of the litigation . . . .

Lavine v. Milne, 424 U.S. 577, 585 (1976).

facilitate the safe, certain and efficient transfer of title to real estate in both residential and commercial transactions.

The belated resuscitation of this statute is of great concern to the ALTA and to all persons relying upon the marketability of land titles. As interpreted by this Court, Section 194 would suddenly erase in this and other similar cases accepted allocations of the burden of proof in actions affecting the titles to real property which have been developed over the years in courts throughout the country. That development of the law has contributed substantially to stable and predictable land transfers which are a necessary prerequisite to the informed judgment of attorneys, abstractors, title insurers, government agencies at various levels and others who must pass daily upon the state of title to real property.

STATEMENT

This brief is submitted in support of two of the petitions for certiorari from a final judgment remanding this case to the District Court with directions to enter quieting title to the trust lands involved, except those claimed by the State of Iowa, in the United States, as trustee for the Omaha Indian Tribe. The relevant facts of this case are set forth in the opinions of this Court, the Court of Appeals and the District Court and are summarized as follows.

On May 19, 1975, the United States, suing as trustee for the Omaha Indian Tribe, brought suit seeking a judgment quieting title in the United States, as trustee, respecting 2,900 acres of land. On May 20, 1975, the very next day, the Omaha Tribe itself filed suit to restrain named landowners from interfering with its peaceful possession and use of the same 2,900 acres and,

subsequently, brought another suit to quiet title.[8] The defendants were several landowners and tenants, a corporate landowner, a corporate mortgagee, the State of Iowa and the State Conservation Commission. It was undisputed that from at least the 1940's until the time of the litigation the defendants and their predecessors in title had occupied, cleared and cultivated the land in dispute.[9]

Following a lengthy trial, the District Court reviewed the evidence and, upon extensive findings of fact, entered judgment against the United States, as trustee, and the Omaha Tribe, quieting title in the defendants. 433 F. Supp. at 68-88, 92. The court determined that the Missouri River had changed by reason of the erosion of the tribal land and accretion to the defendants' riparian land to which it was presently attached. *Id.* at 88.

The Court of Appeals reversed, finding that Section 194 controlled and that "the defendants have failed to overcome the presumptive right of possession and title in the Tribe . . . ." 575 F.2d at 623, 631-33. As a result, the Court of Appeals held that the defendants "failed in

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[8] The tribal complaint to quiet title (No. 75-4067) in fact encompassed 11,500 acres, including the 2,900 acres which was the subject of the action instituted by the United States on its behalf. (No. 75-4024). In consolidating all of the cases for trial, the District Court severed and stayed all claims to land beyond the 2,900 acres at issue. 433 F.Supp. at 69.

[9] The District Court found the land at issue to be "now a valuable and productive tract of farm ground, as evidenced by the purchase of 2,180 acres by defendant Wilson in 1972 by Warranty Deed for a consideration valued at $1,685,000, approximately 1780 acres of which is within [the 2,900 acres immediately in dispute]." 433 F.Supp. at 69.

sustaining their burden of proof under § 194." *Id.* at 651.

Last term this Court granted the petition for certiorari filed by the private individual petitioners limiting review to the following two issues:

> (1) Whether the Eighth Circuit erroneously construed 25 U.S.C. § 194 to make it applicable in this case; and
>
> (2) Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case.[10]

The Court held that Section 194, by its terms, was applicable to this case. 442 U.S. at 668-69. The Court determined that the term "Indian" as used in the statute applies when an Indian tribe, rather than one or more individual Indians, is the litigant. *Id.* at 665-66. It was also determined that the term "white person" includes artificial entities, such as the corporate petitioners, but not the State of Iowa. *Id.* at 666-68. As review was

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[10] At the same time the Court granted the separate petition for certiorari filed by the State of Iowa and its State Conservation Commission upon the following, similar questions:

> (1) Whether the State of Iowa is a "white person," and the Omaha Indian Tribe is "an Indian" within the meaning of 25 U.S.C. § 194; and
>
> (2) Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries.

439 U.S. 963 (1978). A third petition filed by two corporate defendants was granted after the *Wilson* opinion was rendered and that case was remanded to the Eighth Circuit Court of Appeals for further consideration. RGP, Inc. v. Omaha Indian Tribe, 443 U.S. 902 (1979).

limited to the question of the applicability of Section 194 to this case, this Court did not consider the constitutionality of the statute.[11]

As to the second issue, the Court found that the Court of Appeals had properly concluded that federal law governs the substantive aspects of the dispute, 442 U.S. at 669-71, but found that it erred in arriving at a federal standard to determine whether there had been an avulsion or an accretion. *Id.* at 671-79. Rather the Court found that Nebraska law should have been borrowed as the federal rule of decision. *Id.* at 676-78. Because of its view of the controlling law, the Court of Appeals' judgment was vacated and remanded for further proceedings to consider whether the District Court had correctly interpreted Nebraska's law and had properly applied it to the facts in this case.

On remand, the Court of Appeals found that the District Court's interpretation of Nebraska law was incorrect and, in accordance with its prior opinion, held that the parties claiming against the Tribe, except for the State of Iowa, demonstrated only "speculative and conjectural evidence" of their right to quiet title. 614 F.2d at 1155-56. The court further held that those parties failed to sustain their burden of proof under 25 U.S.C. § 194. *Id.* Accordingly, the Eighth Circuit again vacated the judgment of the District Court and remanded the case to that court with directions to enter judgment quieting title to the trust lands involved, except those claimed by the State of Iowa, in the United States, as trustee for the Omaha Tribe. 614 F.2d at 1161.

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[11] Each of the petitioners previously asked the Court to review the constitutionality of Section 194. However, in granting review, the Court restricted its consideration of the questions presented in this respect to the proper construction of Section 194.

SUMMARY OF ARGUMENT

Title 25 U.S.C. § 194 purports to place the burden of proof upon the "white person" in all trials about the right of property in which "an Indian" is a party on one side and "a white person" is on the other, once the Indian establishes a "presumption of title in himself from the fact of previous possession or ownership."

Since this Court has determined that 25 U.S.C. § 194 is applicable to litigation such as this, the Court should now determine whether Section 194 is constitutional. Although the statute had been "dormant" at the time the Court previously decided not to review its constitutionality, it is now commonly at issue in Indian land claims litigation throughout the country.[12] Therefore, the question of its constitutionality is presently of very substantial national interest and importance as its continued application violates individual property rights and encourages unwarranted Indian land claims litigation, thereby impeding the marketability of land titles.

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[12] *See, e.g.*, the cases referred to in note 5, *supra*.

ARGUMENT

I. Section 194 is Unconstitutional Because it Assigns the Burden of Proof Upon a Racial Basis.

In all litigation concerning the title to real estate various of the parties, including the defendants, will often bear the burden of proof on various issues. 442 U.S. at 668. However, Section 194 "operates regardless of the circumstances once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute." *Id.*

The very language of Section 194 should have caused the lower courts to subject the statute to the most rigorous constitutional analysis. Such an analysis would have led to the necessary conclusion that under the variety of tests employed by this Court in evaluating preferential legislation, the automatic assignment of the burden of proof upon a racial basis in Indian land claim cases violates the Fifth Amendment.

One striking aspect of Section 194 is the complete absence of any history of any sort explaining why this specific provision was originally adopted in 1822 as an amendment to the 1802 Indian Trade and Intercourse Act. Nor has there been in the period between that time and the initial opinion of the Eighth Circuit herein any significant administrative or judicial interpretation of the provision.[13] According to Mr. Justice Powell's opinion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) the very absence of any such indication of the perceived wrong at which the statute was directed

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[13] As noted by the Court in its previous opinion, "[t]he legislative history here is uniformative, and executive interpretation is unhelpful with respect to this dormant statute." 442 U.S. at 667.

makes it impossible for Section 194 to meet "the most exacting scrutiny" [14] which must be applied when preferential classifications based upon race or ethic status are at issue:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations . . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

438 U.S. at 307-09, citing *Teamsters* v. *United States*, 431 U.S. 324, 367-76 (1977); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 155-56 (1977); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Here the absence of specific "judicial, legislative, or administrative findings of constitutional or statutory violations" makes it impossible for Section 194 to meet the very threshold of Mr. Justice Powell's analysis.

Since Section 194 does not reflect an articulated legislative purpose,[15] it is impossible to determine whether the non-Indian who must assume thereunder the burden of proof of his ownership of property "regardless of the circumstances" can be certain "that the burden he is asked to bear on that basis is precisely tailored to serve

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[14] 438 U.S. at 300.

[15] *See also*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966).

a compelling governmental interest." 438 U.S. at 299.[16] In the absence of such facts, Section 194 must fail under Mr. Justice Powell's analysis. *See also, In re Griffiths*, 413 U.S. 717, 721-22 (1973); *Loving* v. *Virginia*, 399 U.S. 1, 11 (1967).

Not only does Section 194 fail to meet the basic standard expressed by Mr. Justice Powell in *Bakke*, it also falls short of the constitutional criteria contained in the separate opinion of Justices Brennan, White, Marshall and Blackmun.[17] The Brennan opinion reasserted the principle that "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" 438 U.S. at 359. In order to determine whether such an objective existed and was being met, the Brennan opinion states that more than a "rational basis" for the preferential classification must be shown:

> In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. *Instead, to justify such a classification an important and articulated purpose for its use must be shown.*

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[16] In Dunn v. Blumstein, 405 U.S. 330, 343 (1972) the Court held that the equal protection clause requires that all statutes "affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives."

[17] Although that was a joint opinion, for the sake of convenience and to distinguish it from the individual opinions of Justices White, 438 U.S. at 379, Marshall, *Id.* at 387, and Blackmun, *Id.* at 402, it will be referred to hereinafter in this brief as the "Brennan opinion."

Id. at 361 (emphasis added). Mr. Justice Brennan then applied this standard and discovered a "sound basis" for the view that the classification in question was properly founded on past and present racial discrimination, *Id.* at 362, and that "there [were] no practicable means by which [the University] could achieve its ends in the foreseeable future without the use of race-conscious measures." *Id.* at 376. Neither of those conclusions could be reached in this case.

First, as for the "sound basis" for the preferential classification based upon race, there is, as noted above, simply no "articulated purpose" to evaluate the need for Section 194. The specific "governmental objective" necessary "to justify such a classification" is nowhere shown. But even if one assumes that at the time of its initial adoption in 1822, Section 194 was a response to an Indian tribe's inability to effectively make use of the judicial system to protect its rights to property, that does not mean that the racial classification inherent therein continues to "serve important governmental objectives and [is] . . . substantially related to the achievement of those objectives." 438 U.S. at 359. Indeed, it cannot be seriously argued that the specific deprivation of rights that Section 194 sought to remedy still exists, notwithstanding other deprivations of rights and manifestations of racial discrimination that Indians may currently suffer and that may justify different remedial action.

Since the adoption of Section 194, fundamental changes have occurred with respect to an Indian tribe's legal status as well as with respect to its ability to participate in the litigation process. *See, McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172-73 (1973). The Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82 (1870), was a watershed in protecting the rights of *all* persons engaged in the litigation process and goes beyond

Section 194 in its extension of these rights not just to racial or ethnic minorities but to " 'all persons' including white persons." *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976). Statutory and other restrictions which existed in the nineteenth century on the ability of tribes to sue and to litigate effectively have long since been removed.[18] The very fact that the Omaha Indian Tribe has been represented by the United States and learned private counsel during this entire litigation demonstrates that means less extreme than the automatic application of the burden of proof on a purely racial basis is presently required to provide Indian tribes with proper protection.[19] Thus, the "race-conscious measures" of Section 194 cannot now be said to be the only "practicable means" by which Indian tribes can be given a fair opportunity to claim lands which they assert were once theirs.

That Section 194 no longer serves an "important governmental objective" is the most significant reason why the departure from normal constitutional requirements

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[18] *See generally*, F. COHEN, FEDERAL INDIAN LAW 283-85 (1942); J. APPLETON, RULES OF EVIDENCE 271-80 (1860).

[19] In a very recent opinion the Ninth Circuit refused to apply one of the traditional rules of construction in another situation where the Indian tribe had adequate representation:

> The rule of construction of ambiguous statutes in favor of Indians is based on a concern that the powerful not take advantage of the helpless and uneducated . . . . Where, as here, the Inupiats were represented before Congress by such illustrious counsel as former Supreme Court Justice Arthur Goldberg and former Attorney General Ramsey Clark, we think the rule of construction operates with less force.

United States v. Atlantic Richfield Co., 612 F.2d 1132, 1139 (9th Cir. 1980).

cannot be sanctioned in this case. As noted by Mr. Justice Powell "the scope of the remedies [are] not permitted to exceed the extent of the violations." *Bakke, supra,* 438 U.S. at 300-01. Here where factors which one may presume led to passage of Section 194 no longer exist or have been eliminated by the securing for Indian tribes in other ways their rights to protect their land, the classification is not justified. As noted by Mr. Justice Blackmun in *Bakke*:

> I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is in truth, only a relic of the past . . . . At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.

Id. at 403 (separate opinion). Section 194 is truly a "relic of the distant past." It should now be stricken as a symbol of a measure designed to deal with a condition "that is behind us."

The only judicial analysis of the constitutionality of Section 194 that has occurred to date was by the Court of Appeals in its initial opinion. In rejecting the defendants' contention that Section 194 was unconstitutional, that court erroneously relied upon the Court's statement in *Morton* v. *Mancari,* 417 U.S. 535, 554-55 (1974) that Indians may be "single(d) out . . . for particular and special treatment." 575 F.2d at 631, n.18.

It is well established that this Court will scrutinize "Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment." *Delaware Tribal Business Committee* v. *Weeks,* 430 U.S.

73, 84 (1977). "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946).[20] To the extent that *Mancari* suggests a different standard for equal protection review than the one articulated in the *Bakke* opinions discussed above, such a standard should not apply herein.

Mancari was the first of a recent series of opinions wherein the Court attempted to delineate an appropriate equal protection standard for Indian legislation. At issue in *Mancari* was whether an employment preference for qualified Indians at the Bureau of Indian Affairs ("BIA") contravened the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e *et seq.*, and constituted invidious racial discrimination in violation of the due process clause of the Fifth Amendment.

In determining that the employment preference at issue was proper, the Court found that the preference did not constitute "racial discrimination" nor even a "'racial' preference." 417 U.S. at 553. "Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government" because it was granted to Indians "as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554.[21]

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[20] As noted by Mr. Justice Powell in *Bakke*:

> It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.

438 U.S. at 295.

[21] Indeed, the Court analogized the preference to the requirement in art. I, § 3, cl. 3 of the Constitution that a United States Senator be "an Inhabitant of that State for which he shall be chosen." 417 U.S. at 554. *See also*, United States v. Antelope, 430 U.S. 641, 646-47 (1977).

This analysis was applied in *Fisher* v. *District Court*, 424 U.S. 382 (1976) (per curiam), where the Court held that members of the Northern Cheyenne Tribe could be denied access to the Montana state court for adoption proceedings that arose on a reservation and would be required to proceed in tribal court. Again, the Court held that there was no "impermissible racial discrimination" since "[t]he exclusive jurisdiction of the tribal court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." *Id.* at 390.

The integral relationship between the classification at issue and the "quasi-sovereign" status of Indian tribes discussed in *Mancari* and *Fisher* were specifically relied upon by the Court in the even more recent case of *United States* v. *Antelope*, 430 U.S. 641 (1977). There the Court upheld a federal criminal statute applicable to Indians which provided a more severe penalty than the comparable state statute applicable to non-Indians. The Court expressed the view that such federal legislation "is not based upon impermissible racial classifications," *Id.* at 645, but then went on to restate and explain the principles of *Mancari* and *Fisher*:

> Both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests. But the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of one-sovereign political communities; it is not to be

> viewed as legislation of a " 'racial' group consisting of 'Indians' . . . ." *Morton* v. *Mancari, supra,* at 553 n.24, 94 S.Ct., at 2484.

Id. at 646-47.

Were Section 194 a rule of law applicable only in tribal courts or in the resolution of claims by a tribe against the government then, perhaps, the standard for reviewing an equal protection challenge as stated in *Mancari* would apply. But as a rule of general application in all courts and against all non-Indians (except states) "regardless of the circumstances," Section 194 cannot be said to be federal regulation of "Indian affairs" or of "Indian tribes," thereby "rooted in the unique status of Indians as a 'separate people' with their own political institutions." [22] Thus, the classification in Section 194 is "racial" rather than "political" requiring the most compelling justification for the preference to be sustained.

Further, even were the *Mancari* standard applicable, Section 194 cannot be reconciled with its underlying rationale. In *Mancari*, the Court would not disturb the legislative judgment establishing the preference as long as the preference was reasonable and could be "tied

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[22] This Court has recognized that the sovereign powers of Indian tribes have been implicitly divested when issues related to non-Indians are concerned:

> [T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.

United States v. Wheeler, 435 U.S. 313, 326 (1978).

rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ." 417 U.S. at 555.

In interpreting the meaning of Section 194, this Court suggested that the statute was originally designed for "preventing and providing remedies against non-Indian *squatters* on Indian lands." 442 U.S. at 667 (emphasis supplied). As the Court explained, "recurring trespass upon and illegal occupancy of Indian territory" underlay numerous early Congressional Indian Acts which provided for strong measures, including "the use of force," to prevent non-Indians from settling on tribal properties. *Id.* at 664. Obviously, there has been significant and positive change over the past one hundred sixty years in the means Indians have available for the protection of their rights to land. A dispute in 1980 in a federal court between Indians who base their claims on "prior possession" and non-Indians who assert their claims through a chain of title, and not as "squatters," is a far different circumstance than that which the Court suggested Congress contemplated in 1822 when it initially enacted the predecessor of Section 194. It is no more reasonable to allocate the burden of proof on the basis of race today than it would be to call upon the United States Cavalry to oust petitioners from the land.

The automatic assignment of the burden of proof may have once had a "rational tie" to a legitimate goal in the early years after its passage, when witnesses were still alive, the relevant documents were still in existence and the defendant was perhaps even the first non-Indian occupant of the land. However, in its present application, years "after the fact," such a "tie" is notably absent.[23]

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[23] *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legisla-

Thus, the conditions that caused Congress to enact Section 194 in 1822 and 1834 no longer exist. As a result, the long dormant Section 194 is no longer a rational exercise of legislative authority and its classification can no longer be viewed as a "non-racial" statute.[24]

II. Section 194 is Unconstitutional Because it Impinges Upon a Fundamental Right.

Section 194 is subject to "strict scrutiny" on grounds other than equal protection alone. In *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. at 1, 17 (1973) the Court stated that when a statute impinges upon a "fundamental right explicitly or implicitly protected by the Constitution" it requires "strict judicial scrutiny." The Court has repeatedly held that the right to engage in the litigation process to protect one's interest in property is a fundamental right that exists at the very heart of due process.[25] In *Chambers* v. *Baltimore*

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tion."); *Cf.*, Perrin v. United States, 232 U.S. 478, 487 (1914) ("The conditions justifying the prohibition remain substantially the same as when [the statute] was adopted.").

[24] The Court's opinion interpreting the meaning of this statute held that artificial entities as well as the individual petitioners, but not states, "must necessarily be disadvantaged by § 194." 442 U.S. at 666-68. This second preferential classification inherent in the application of Section 194 also warrants constitutional review. In fact, there is no "principled basis" for a continuing classification of the burden of proof on any basis. As a result, the Court need not be called upon to impose its judgment in an area generally allocated to Congress. *See* Mathews v. Diaz, 426 U.S. 67, 84 (1976); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 97 (1977) (Stevens, J. dissenting).

[25] *See e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Pennoyer v. Neff, 95 U.S. 714, 733 (1878).

& Ohio R.R. Co., 207 U.S. 142, 148 (1907) the Court stated:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

More recently, the Court emphasized that "the right to a meaningful opportunity to be heard . . . must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie* v. *Connecticut*, 401 U.S. 371, 379-80 (1971).

The fact that virtually the entire country was at one time in the possession of Indian tribes means that Section 194 could be urged to shift the burden of proof and persuasion to defendants (except states) in every Indian land claim case "regardless of the circumstances." If the claimants were other than an Indian tribe, their action would be barred by the state statute of limitations since those statutes are clearly applicable where no tribe is involved. However, to the extent that those statutes do not apply in cases brought by a tribe or by the United States, defendants must suffer the double burden of both defending against claims that normally would have been terminated long ago and proving facts respecting occurrences in the far distant past.

It should also be emphasized that this is not a situation where the person disadvantaged by the classification at issue has another, separate opportunity to exercise his due process right. The opportunity to defend the land claim is singular and exists only within the venue of the court. *See, Grant Timber & Manufacturing Co.* v. *Gray*, 236 U.S. 133 (1915). The fact that this due process right cannot be exercised elsewhere should have been considered by the Eighth Circuit before it allowed

this right to be so heavily encumbered.[26] The unreasoned shifting of this onerous burden to all of the current title holders except the State of Iowa upon the sole basis that the plaintiff is an Indian tribe deprives the due process clause of any substantive meaning.

Justice Frankfurter captured the essence of procedural due process when he wrote that:

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and *opportunity to meet it.* Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Facist Refugee Committee v. *McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J. concurring) (emphasis supplied). By imposing a difficult and often impossible burden of proof upon people who themselves are very far removed from the original evil sought to be protected by Congress, the "feeling . . . that justice has been done" is lost.

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[26] *See*, Boddie v. Connecticut, *supra*, at 375-76; *Cf.* United Jewish Organizations v. Carey, 430 U.S. 144, 165-66 (1977) (white voters not "fenced out" from the political process).

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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